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90-1114
No._____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

EDMUND J. BODINE, JR.,

Petitioner

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION

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EDMUND J. BODINE, JR.

QUESTIONS PRESENTED

I.

WHETHER THIS COURT SHOULD INVOKE ITS SUPERVISORY JURISDICTION WHERE THE ELEVENTH CIRCUIT COURT OF APPEALS EXCEEDED ITS APPELLATE POWERS IN REVIEWING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR REMITTITUR BECAUSE SUCH REIVEW IS CONSTITUTIONALLY PRECLUDED BY THE PROVISIONS OF THE SEVENTH AMENDMENT TO THE U.S. CONSTITUTION WHICH STATES THAT "NO FACT TRIED BY A JURY, SHALL BE OTHERWISE REEXAMINED IN ANY COURT OF THE UNITED STATES, THAN ACCORDING TO THE RULES OF THE COMMON LAW"?

II.

ASSUMING ARGUENDO THAT THE SEVENTH AMENDMENT GRANTS THE COURT OF APPEALS THE POWER TO REVIEW, WHETHER THIS COURT SHOULD INVOKE ITS SUPERVISORY JURISDICTION WHERE THE ELEVENTH CIRCUIT ERRED IN ARBITRARILY REDUCING THE PLAINTIFF'S PAIN AND SUFFERING DAMAGES FROM $2,000,000.00 TO $1,000,000.00; IN THAT, THE COURT OF APPEALS SIMPLY ENTERED THE REMITTITUR WITHOUT EXPLANATION IN VIOLATION OF *GRUNENTHAL V. LONG ISLAND RAILROAD CO.*, 393 U.S. 156 (1968), RATHER THAN CORRECTLY APPLYING THE APPROPRIATE ABUSE OF DISCRETION STANDARD OF REVIEW TO THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR REMITTITUR?

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OCTOBER TERM 1990

EDMUND J. BODINE, JR.,
Petitioner

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Edmund J. Bodine, Jr., petitions for a Writ of Certiorari to review the Judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered September 26, 1990 and rendered by denial of rehearing on November 15, 1990.

OPINIONS BELOW

This opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 912 F.2d 1373, and is Appendix A of the Petition. (A.1-10). (Slip opinion as prepared by West Publishing Co.).

Appendix B, (A.11) is an order entered by the Honorable Clarence C. Newcomer, visiting District Judge, denying Kemper's Motion for Remittitur.

JURISDICTION

The opinion and Judgment sought to be reviewed were entered September 26, 1990, Appendix A, (A.1-10), and were rendered upon the denial of a timely petition for rehearing by order dated November 15, 1990. Appendix C, (A.12). This Petition for Writ of Certiorari has been filed within ninety days of the denial of rehearing. This Court's jurisdiction is invoked under Sec. 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This Petition contains the following constitutional provision: U.S. Const. amend. VII which states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

A. District Court Jurisdiction

Jurisdiction of the United States District Court, Middle District of Florida, was predicted upon diversity of citizenship. 28 U.S.C. Sec. 1332.

B. Facts and Procedural History

Respondent, Edmund J. Bodine, Jr., ("Bodine"), brought a diversity action in the United States District Court for the Middle District of Florida against Kemper predicated upon *Life Insurance Company of Georgia v. Lopez*, 443 So.2d 947 (Fla. 1983), involving the tort of negligent failure to cancel an insurance policy under circumstances where the insurer has actual knowledge that the beneficiary plans to murder the insured to collect the policy benefits.

During the trial, Dr. Daniel Sprehe, a board certified psychiatrist, testified that, as a result of the contract killing death

threat and the subsequent failure of the insurance company to cancel the policy after notification, the Plaintiff suffered a "paranoid disorder" and sustained "permanent emotional scarring". Dr. Sprehe was the only expert witness who testified as to pain and suffering damages. The Defendant presented no evidence, no expert witnesses and no witnesses in opposition of Plaintiff's pain and suffering claim.

The Jury awarded $75,000 in lost earnings, $2,000 in out-of-pocket expenses, and $2,000,000 in emotional distress "pain and suffering" damages. The Jury found that Kemper was 75% negligent and Bodine 25% negligent, and the Amended Judgment reduced the total award by 25%. Appendix D, (A.13). Kemper filed a Motion for New Trial, a Motion for Remittitur and a Motion for Judgment Notwithstanding the Verdict, which were denied by order dated May 30, 1989. Appendix B, (A.11).

On appeal, the unanimous Eleventh Circuit panel affirmed the finding of negligence by the Trial Jury holding that there was no merit in any of the Respondent Kemper's arguments as to the issue of liability. (Appendix A, (A. 2-3), adequately sets forth the underlying facts upon which the Jury found that Kemper was negligent in failing to cancel the policy.)

However, the Circuit Court did order, without explanation, a remittitur of $1,000,000 of the Trial Jury's pain and suffering award or, in the alternative, a new trial on the sole issue of damages for pain and suffering. Appendix A, (A. 9).

Kemper timely filed a Petition For Rehearing and Request for Certification of Dispositive Issues of Law to the Supreme Court of Florida. Said Petition For Rehearing and Request for Certification were denied on November 15, 1990. Appendix C & E, (A.12,14).

REASONS FOR GRANTING THE WRIT

I

THE ELEVENTH CIRCUIT COURT OF APPEALS EXCEEDED ITS APPELLATE POWERS IN REVIEWING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR REMITTITUR BECAUSE SUCH REVIEW IS CONSTITUTIONALLY PRECLUDED BY THE PROVISIONS OF THE SEVENTH AMENDMENT TO THE U.S. CONSTITUTION WHICH STATES THAT "NO FACT TRIED BY A JURY, SHALL BE OTHERWISE RE-EXAMINED IN ANY COURT OF THE UNITED STATES, THAN ACCORDING TO THE RULES OF THE COMMON LAW."

Pursuant to the Seventh Amendment to the U.S. Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

While the U.S. Supreme Court has previously granted certiorari to consider the issue of remittitur, the Supreme Court has never expressly held that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. _____, 109 S. Ct. 2909, 2922 n. 25 (1989). The Petitioner would argue that the Seventh Amendment does not provide for appellate review of the remittitur issue because the Seventh Amendment does not allow for the courts "to take steps which ultimately might interfere with the proper role of the jury". *Browning-Ferris Industries, supra,* at 2923 n. 26.

Further, the law has long been settled that an order of additur by a federal court violates the Seventh Amendment right to a jury trial in civil cases. *Hattaway v. McMillian,* 903 F. 2d 1440,

1451 (11th Cir. 1990); *Dimick v. Schiedt*, 293 U.S. 474, 486-488 (1935).

The Petitioner would point out that there is no justifiable difference between the Seventh Amendment not allowing for an additur by a trial judge but allowing for a remittitur by a trial judge. Both increasing and decreasing a damage award interferes with the function of the jury. Since the Seventh Amendment precludes an additur by a judge in federal court, the Plaintiff is placed at an unconstitutional disadvantage in the respect that, after a judgment award has been obtained, the Defendant knows that, upon the filing of post-trial motions, the judgment award can never be increased, but can be decreased.

Further, the Petitioner is not equally protected under the law because the plaintiff cannot appeal the trial court's granting of a motion for remittitur since he (or she) is faced with either accepting the remittitur, and thereby waiving the appeal, or accepting a new trial. *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977); *See also*, 2 Fed Proc, L Ed Sec. 3:616. While, under the present law, the defendant can appeal the denial of a motion for remittitur. Petitioner believes that the present state of the law violates the Seventh Amendment and his right to equal protection under the Constitution.

II

ASSUMING ARGUENDO THAT THE SEVENTH AMENDMENT GRANTS THE COURT OF APPEALS THE POWER TO REVIEW, THE ELEVENTH CIRCUIT ERRED IN ARBITRARILY REDUCING THE PLAINTIFF'S PAIN AND SUFFERING DAMAGES FROM $2,000,000.00 TO $1,000,000.00; IN THAT, THE COURT OF APPEALS SIMPLY ENTERED THE REMITTITUR WITHOUT EXPLANATION IN VIOLATION OF *GRUNENTHAL V. LONG ISLAND RAILROAD CO.*, 393 U.S. 156 (1968), RATHER THAN CORRECTLY APPLYING THE APPROPRIATE ABUSE OF DISCRETION STANDARD OF REVIEW TO THE TRIAL COURT'S DENIAL OF

THE DEFENDANT'S MOTION FOR REMITTITUR.

Federal law governs the decision of whether a remittitur should be granted in a diversity case. Under federal law, whether the trial court properly refused to grant remittitur or a new trial on the grounds of an excessive damage award is tested by an abuse of discretion standard. Review is limited simply to whether the district court's refusal to set aside the jury's verdict constituted a manifest abuse of its discretion. *Royal College Shop, Inc. v. Northern Insurance Co. of N.Y.*, 895 F. 2d 670, 677 (10th Cir. 1990); *See also, Edynak v. Atlantic Shipping, Inc. CIE. Chambon*, 562 F. 2d 215 (3rd Cir. 1977); *Murray v. Fairbanks Morse*, 610 F. 2d 149 (3rd Cir. 1979); *Sykes v. McDowell*, 786 F. 2d 1098 (11th Cir. 1986).

In *Edynak v. Atlantic Shipping, Inc.*, the Court stated:

> It is simply not our function to assess what would constitute fair recompense for the injuries sustained by the Plaintiff; our duty is instead to ascertain whether the trial judge, weighing all the evidence on damages, has exercised his considered judgment as to a rational verdict in a judicial manner.

Edynak, supra, at 226.

In *Edynak*, the jury awarded damages for loss of earning capacity and for pain and suffering in the approximate amount of $273,500.00. *Edynak's* surgeon stated that he was "severely traumatized from a psychological point of view." The Appellate Court went on to say that "although the award was quite high", it was not "contrary to all reason." The Court continued:

> The deference we owed *the trial judge, "who has had the opportunity to observe the witnesses and consider the evidence in the context of a living trial rather than upon a cold record,"* and "the respect due the jury's determination of such matters of fact as the weight of evidence and the quantum of damages," combined here to overcome whatever misgivings we might have regarding the size of the verdict. *Had we been the district judge, we might perhaps found the verdict*

> *excessive and granted Atlantic's motion for a new trial.* But we cannot say that the award shocks the judicial conscience, and therefore cannot hold the district court's denial of motion constituted a manifest abuse of discretion. (Emphasis added).

Edynak, supra, at 226.

Likewise, in *Murray v. Fairbanks Morse,* the jury awarded $2,000,000.00 to the Plaintiff to be adjusted by a 5% comparative negligence reduction. The appellate court found that the jury's award amounted to nearly 1.7 million dollars in award for mental suffering and for loss of enjoyment of life. The Court also noted that, even though the final adjusted award was the highest damage award ever in a Virgin Island personal injury action, *"evidence of pain and suffering is particularly ill-suited to review upon only a written record". Murray, supra,* 610 F. 2d at 153, *quoting, Edynak, supra,* 562 F. 2d at 227 n. 16. (Emphasis added).

The Court noted that the trial judge in declining to order a remittitur on the issue of damages noted that "although he personally would not have awarded as high a verdict, it is not enough that the Court, as the trier of fact, would have awarded a lesser amount of damages. Rather, the damages assessed by the jury must be so unreasonable as to offend the conscience of the Court." The Appellate Court went on to say:

> We cannot perceive an abuse of discretion merely because we would have found the damages to be considerably less than those awarded and would have set them aside had we been the district court.

In affirming the judge's denial of remittitur, the Court stated:

> Although we believe the jury's award was very high and that more severely injured plaintiffs have often received less compensation, we cannot say that the district court abused its discretion in failing to reduce the verdict as excessive.

Murray, supra, at 154.

Likewise, in the present case, the trial judge was in the best

position to review the witnesses and the evidence presented before the jury. Petitioner would again note that the only evidence presented before the jury regarding the mental anguish and suffering of Mr. Bodine, besides the testimony of Mr. Bodine himself, was the testimony of the highly regarded psychologist, Dr. Daniel Sprehe, who was called as an expert witness. Dr. Sprehe testified regarding Mr. Bodine's continuing fears due to the threats on his life which are permanent in nature and, even though the Defendant had had years in which to have the Plaintiff examined by another medical expert, it failed to do so. Consequently, the evidence regarding Mr. Bodine's mental condition and suffering was uncontroverted and, as the 3rd Circuit has stated, evidence of pain and suffering damages is ill-suited for review upon only a written record.

In considering this Petition, the Petitioner would like to note the similarities of this case with the case of *Grunenthal v. Long Island Railroad Co.*, 393 U.S. 156 (1968). In *Grunenthal,* the Supreme Court was confronted with a similar situation where the Plaintiff had been awarded a damage amount of $305,000.00, including $150,000.00 in pain and suffering for a crushed foot. While the trial judge in denying the remittitur conceded "that the aggregate award seemed generous", the Supreme Court noted that the judge "emphasized that the trial record here has many unusual features, *the most outstanding one being the non-controversial nature of the defense has to damages.* The jury, *impressed by the uncontroverted proof adduced by plaintiff,* may well have adopted *in toto* its full significance and drawn such normal and natural inferences therefrom as the law endorses." *Grunenthal, supra,* at 158, 159. (Emphasis added).

In that case, the 2d Cir. Court of Appeals reduced the award to $200,000.00 and the U.S. Supreme Court in reversing stated that the Court of Appeals in applying the abuse of discretion standard of review is to make a detailed appraisal of the evidence bearing on the damages. The Court stated:

> If the Court of Appeals made a(n)...appraisal of the evidence in this case, the details are not disclosed in the majority opinion... *(T)he relevant discussion is*

> *limited to the bald statement that "giving Grunenthal the benefit of every doubt, and weighing the evidence precisely in the same manner as we did in Dagnello (Dagnello v. Long Island R. Co., 289 F. 2d 797 (2d Cir. 1961)... we cannot in any rational manner consistent with the evidence arrive at a sum in excess of $200,000.00".* We have therefore made our own independent appraisal of the evidence. We conclude that the trial judge did not abuse his discretion...

Grunenthal, supra, at 159, 160. (Emphasis added).

Similarly, in the Eleventh Circuit's opinion in *Bodine v. Federal Kemper Life Assurance Co.,* 912 F.2d 1373 (11th Cir. 1990), the Court made the bald statement:

> We have carefully reviewed the record in this regard... (W)e conclude that the maximum damages for pain and suffering which the jury could have found on the evidence in this case was $1,000,000.00.

Bodine, supra, at 1378, 1379. Appendix A, (A. 9).

In making this conclusory finding, there was no discussion regarding the trial court's denial of the motion for remittitur. Further, while the 11th Circuit stated that it applied the "principles" adopted in *Gorsalitz v. Olin Mathieson Chemical Corp.,* 429 F. 2d 1033 (5th Cir. 1970) (which mentioned abuse of discretion), there was no discussion as to the appropriate abuse of discretion standard of review, and most importantly, pursuant to the Supreme Court's decision in *Grunenthal,* there was no detailed appraisal of the evidence which warranted the Court of Appeals overturning the trial court's order and granting a remittitur of $1,000,000.00, especially since the evidence regarding the Plaintiff's pain and suffering was uncontroverted.[1]

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1 The Plaintiff surmises that the 11th Cir. may have considered the fact that the jury only awarded $77,000.00 in actual damages ($75,000.00 for lost wages and $2,000.00 for expenses) in reducing the pain and suffering award from $2,000,000.00 to $1,000,000.00. However, the Petitioner would note that the Supreme Court has previously found that a trial court's denial of a motion for remittitur was not an abuse of discretion where the jury awarded $6,000,000.00 in punitive damages after only awarded $51,000.00 in actual damages. *Browning-Ferris Industries, supra,* 109 S.Ct. at 2923 (1989).

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX A

Edmund J. BODINE, Jr.,
Plaintiff-Appellee,

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY,
Defendant-Appellant.

No. 89-3481.

United States Court of Appeals,
Eleventh Circuit.

Sept. 26, 1990.

Insured sued his insurer for insurer's alleged negligence in failing to cancel a key man life insurance policy despite its knowledge that a beneficiary was attempting to murder insured to collect the policy benefits. The United States District Court for the Middle District of Florida, No. 851814-Civ-T-17, Clarence C. Newcomer, Visiting Judge, entered judgment on a jury verdict for insured, and insurer appealed. The Court of Appeals, Anderson, Circuit Judge, held that: (1) damages for pain and suffering or emotional distress were not precluded by a pretrial ruling; (2) under Florida law, the significant discernible physical injuries rule was applicable to the emotional distress injuries; and (3) the maximum damages for pain and suffering which the jury could have found was $1,000,000.

Affirmed in part, vacated in part, and remanded with instructions.

1. Federal Civil Procedure 1940

Pretrial order dismissing insured's claim against insurer for negligent infliction of emotional distress did not preclude damages for pain and suffering or emotional distress under insured's *Lopez* claim, in which insured sought damages for insurer's negligent failure to cancel insurance policy despite insurer's knowledge that beneficiary was attempting to murder insured to collect policy benefits.

2. Damages 50

As general rule, Florida law precludes recovery for emotional

distress injuries caused by defendant's negligence in absence of physical impact to claimant.

3. Damages 56.10

Under Florida law, plaintiff must show discernible physical injuries in order to recover for emotional distress under *Lopez* claim, arising from insurer's negligent failure to cancel insurance policy despite knowledge that beneficiary is attempting to murder insured to collect policy benefits.

4. Damages 56.10

Maximum amount insured could have recovered for insurer's negligent failure to cancel insurance policy despite insurer's knowledge that beneficiary was attempting to murder insured to collect policy benefits was $1,000,000.

Appeal from the United States District Court for the Middle District of Florida.

Before HATCHETT and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

ANDERSON, Circuit Judge.

Edmund Bodine sued Federal Kemper Life Assurance Company ("Kemper") in federal district court under that court's diversity jurisdiction. The claim upon which relief was granted is known as a *Lopez* claim. In *Life Ins. Co. of Georgia v. Lopez*, 443 So.2d 947 (Fla.1983), the Florida Supreme Court recognized the tort of negligent failure to cancel an insurance policy where the beneficiary attempts to murder the insured to collect the policy benefits and where the insurer has actual notice of the murder plot.

In this case, the FBI uncovered a plot to murder Bodine. Initially, no one was certain who was arranging Bodine's death. However, it was discovered that William Stroup, one of Bodine's partners, was behind the plot to murder Bodine so that his company, Cayman Films, Ltd., would collect on the $2,000,000 key man life insurance policy which Kemper had issued on Bodine's life. Philip Yordan, another partner whose life was also in danger, and Bodine called Kemper on November 7, 1983, and demanded that Kemper cancel the insurance policies on both of their lives. There was evidence from which the jury could have reasonably found that by early November 1983, Kemper had actual

notice of facts sufficient to trigger its duty under *Lopez*. By that time, Kemper had been notified of the murder plot against Bodine and of the fact that the insurance was a likely motive. By that time, Kemper either had received verification of this from appropriate law enforcement personnel, or could have upon appropriate investigation. Nevertheless, Kemper did virtually nothing from November 11 until December 6, 1983. On that date, Bodine's newly-hired attorney made another demand that Kemper cancel the policy on Bodine's life. On December 7, 1983, under the direct orders of Kemper's president, Kemper cancelled the policy. Bodine's attorney was notified of the cancellation; however, Bodine had gone into hiding and did not learn that the policy had been cancelled until February 28, 1984[1].

The only issue that went to trial before the jury was Bodine's *Lopez* claim. The jury found that Kemper was negligent with respect to the request to cancel the insurance policy. The jury found total damages as follows: $75,000 lost earnings; $2,000 out-of-pocket expenses; and $2,000,000 pain and suffering. The jury found that the total damages were proximately caused in the following percentages: 75% by Kemper and 25% by Bodine. Kemper appealed. We affirm in all respects except for the award of damages for pain and suffering, with respect to which we order a remittitur. Although Kemper raises numerous issues on appeal, only three warrant discussion.[2]

I. PRECLUSION OF DAMAGES FOR EMOTIONAL DISTRESS

[1] Kemper argues that damages for pain and suffering or emotional distress were precluded in this case because of a pretrial ruling on January 23, 1989, by Judge Kovachevich granting partial summary judgment in favor of Kemper. Bodine's complaint had alleged not only the *Lopez* claim, but also other claims, including a claim for negligent infliction of emotional distress. In her January 1989 opinion, Judge Kovachevich granted partial summary judgment, dismissing Bodine's claim for negligent infliction of emotional distress, because Bodine had failed to

1. Bodine gave Kemper his parents' address and requested that Kemper inform them upon cancellation of the policy; however, Kemper did not send the notification of cancellation to the requested location. Had Kemper done so, Bodine would have received the notification because Bodine contacted his parents twice daily during the relevant time frame.

2. Kemper's other claims of error have no merit and warrant no discussion.

demonstrate a genuine issue of fact either as to physical impact or significant discernible physical injury resulting from psychic trauma.[3] Kemper argues on appeal that Judge Kovachevich's ruling that there was no genuine issue of fact as to significant discernible physical injuries should apply both to Bodine's negligent infliction of emotional distress claim and also to his *Lopez* claim. Following Judge Kovachevich's January 1989 order, the case was assigned for trial to Judge Newcomer. Kemper filed a motion in limine presenting this issue to Judge Newcomer. On March 7, 1989, Judge Newcomer filed an opinion rejecting this argument, finding that Judge Kovachevich's January 1989 order granted summary judgment only on the negligent infliction of emotional distress claim, and thus did not foreclose Bodine's *Lopez* claim or his proof of damages resulting from the *Lopez* violation (i.e., psychic trauma which manifested itself in significant discernible physical injuries). On appeal, Kemper urges us to hold that the district court erred in failing to interpret the January 1989 summary judgment order as foreclosing this claim for damages under *Lopez*.

Although the district court's January 1989 order is not as clear as we might hope, we conclude that the district court did not err in its interpretation. The January 1989 order grants summary judgment on the claim for negligent infliction of emotional distress, but the same order clearly retains the *Lopez* claim. The district court's interpretation of its previous order is not unreasonable. We find further support for this conclusion in the fact that Kemper's motion for summary judgment, on which the court was ruling in its January 1989 order, did not request summary judgment on the issue of whether Bodine could recover damages for emotional distress under his *Lopez* claim. Not having done so, it is understandable that Judge Kovachevich would not grant summary judgment on that issue. Fed.R.Civ.P. 56(c). We also note that the January 1989 partial summary judgment, dismissing some but not all of the claims, was an interlocutory order, and thus was subject to revision by the district court. *United States v. Koenig*, 290 F.2d 166 (5th Cir.1961) (whether to reconsider a previous interlocutory order of a different judge is within the sound discretion of the trial judge), *aff'd sub nom. DiBella v.*

3. The distinction between the physical impact doctrine and the significant discernible physical injury rule is discussed in Part II of this opinion.

United States, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962);[4] *see also* 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶56.20[1] (2d ed. 1988) (partial summary judgment is interlocutory in character and is subject to revision by the trial court).

Thus, we reject Kemper's argument that Bodine was precluded by the January 1989 order from seeking damages for emotional distress resulting from the alleged *Lopez* violation.[5]

II. IMPACT DOCTRINE VS. SIGNIFICANT DISCERNIBLE PHYSICAL INJURIES RULE

[2] Kemper also argues that Bodine's *Lopez* claim is barred in this case by Florida's physical impact doctrine. As a general rule, Florida law precludes recovery for emotional distress injuries caused by a defendant's negligence in the absence of physical impact to the claimant. *Gilliam v. Stewart,* 291 So.2d 593 (Fla.1974). In this case, Kemper argues that Bodine suffered no physical impact, either from Kemper itself or from the suspected murder plot. Thus, Kemper urges that the district court should have granted its motion for directed verdict and for judgment notwithstanding the verdict. The Supreme Court of Florida has carved out some exceptions to the physical impact doctrine. For example, in *Champion v. Gray,* 478 So.2d 17 (Fla.1985), the Supreme Court addressed the "unusual and nontraditional cause of action in allowing damages caused by psychic injury following an injury to another." *Id.* at 20. There, a drunken driver ran off the road and killed Karen Champion. Karen's mother heard the impact, came immediately to the scene, saw her daughter's body, and was so overcome with shock and grief that she collapsed and died on the spot. *Id.* at 18. The mother's estate sued the driver for damages to, and the wrongful death of, the mother. The Supreme Court rejected the application of the Florida rule requiring that a plaintiff must suffer a physical impact before recovering for emotional distress caused by the negligence of

4. This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981).

5. Kemper also suggests on appeal that it was surprised and prejudiced by the district court's ruling allowing Bodine to prove damages for emotional distress. We reject that argument. As noted in the text, the most reasonable reading of the January 1989 order was that it did not preclude such damages, thus, any reliance by Kemper on that order was unreasonable. Moreover, Kemper was on ample notice before trial that Bodine was asserting such damages. Finally, Kemper never sought a continuance on this ground from the district court.

another. Instead, the court held "that a claim exists for damages flowing from a significant discernible physical injury when such injury is caused by psychic trauma resulting from negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing the injury, is foreseeably injured." *Id.* at 20.

[3] The Florida courts have never addressed the issue of which rule applies to a *Lopez* claim, the physical impact rule or the significant discernible physical injuries rule. The district court opined that, when faced with the issue, the Florida Supreme Court would apply the significant discernible physical injuries rule. We agree with the district court's conclusion and adopt the following portion of its reasoning:

The "impact rule" is to provide a "threshold indicator" of significant injury so the courts may feel satisfied that an emotional distress-based injury has actually occurred.

The *Champion* Court determined that this "threshold indicator" is not necessary when a "discernible physical injury [is] caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person, [because this] is too great a harm to require direct physical contact . . ." *Id.* at 18. The Court did note, however, that there is still the requirement that the plaintiff suffer a "causally connected clearly discernible physical impairment [which] must accompany or occur within a short time of the psychic injury." *Id.*

The Supreme Court was aware that it had created a new tort in its affirmance of the lower court *Lopez* decision. *Lopez*, 443 So.2d at 949. It is a negligence cause of action unlike all others. The insurance company, in the proper circumstances is held to have a duty to act to deter the death threat:

> Such . . . circumstances must surely impose on the insurance company a duty to eliminate any motive for effecting the insured's death if not by withdrawing the coverage . . . then at least by warning the beneficiary that no proceeds would be payable if she in fact murdered the insured. Knowledge that the insurance company was aware of the plot and would scrutinize the insured's "accidental" death would *surely serve as a deterrent* to the accomplishment of the evil purpose. *Id.* [emphasis added].

Logically, the "impact" which is likely is not caused by the tortfeasor under the new *Lopez* tort. The only impact which is possible is, as in *Lopez,* where the death threat is actually carried out or is in the process of being carried out. The impact is not created by the actions of the defendant insurance company, but rather flows indirectly from the failure to cancel the policy thus leaving reason for the murder, the insurance benefits, as a viable option for the murderers to pursue. The possible impact is one over which defendant has little direct control; it is, rather, an event almost entirely in the hands of a third party, save for defendant's duty to act to deter the event.

I conclude that the Florida Supreme Court would not find that the "impact rule" would create any principled "threshold" of injury that would separate meritorious claims from those which are not meritorious. The doctrinal trend in Florida, as evidenced by the Supreme Court's decision in *Champion,* is to a relaxation of the "impact rule" in situations where the rule creates an arbitrary bar to those who should be compensated for emotional distress-related injury. It is clear from *Lopez* that the Florida Supreme Court believes that those injured by the negligence of the insurance companies in cases such as this one should be compensated. As in the scenario in *Champion,* the Court believes that the harm is "too great to require direct physical contact." There may be no emotional distress greater than the fear that one's life is constantly in danger from an unknown assailant. Therefore I conclude that the application of the "impact rule" would create the type of unprincipled threshold which the Supreme Court sought to avoid in *Champion,* and would nearly eradicate the recovery under the cause of action it purposefully created.

R4-144 at 5-7.

This conclusion is also supported by several other considerations. The Florida Supreme Court opinion in *Lopez* placed a clear duty on an insurance company with actual notice of the policy beneficiary's murderous intentions toward the insured to investigate and eliminate the motive for the murder, either by cancelling the policy or by warning the beneficiary that no proceeds would be payable if the beneficiary murdered the insured. Although there was physical impact in *Lopez* in the sense that the threatened murder was actually attempted, nothing in the opinion suggests that there was a *sine qua non* of the cause of action. Moreover, it is obvious that in most *Lopez* situations the threatened murder will be intercepted by law enforcement action

so that no physical impact will occur; yet, nothing in the *Lopez* opinion suggests that the cause of action will exist only in those rare situations where the murder is actually attempted such that there is a physical impact on the insured.[6]

Another factor supporting our conclusion is that the strict prerequisites for a *Lopez* claim greatly reduce the risk of fraudulent claims, thus satisfying the *raison d'etre* for the impact rule. A *Lopez* claim arises only where the insurance company receives actual notice of intent on the part of a policy beneficiary to murder the insured. It is unlikely that an insured would manufacture such a claim and give the required notice to the insurance company, because the police investigation which would naturally ensue would almost surely uncover the scheme and subject the insured to severe consequences. Moreover, in the event of an actual murder scheme of the *Lopez* type, the likelihood of fraudulent claims of psychic trauma is mitigated by the fact that emotional distress is very reasonable under such circumstances. In a similar circumstance, the Florida Supreme Court has held that it is sufficient if the psychic trauma manifests itself in significant discernible physical injuries. *Champion v. Gray,* 478 So.2d 17 (Fla.1985).[7]

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6. The *Lopez* claim is similar to the claim allowed in *Champion v. Gray, supra,* in that both are nontraditional causes of action and both involve a great likelihood that the impact rule would rarely be satisfied.

7. Kemper's reliance on *Sguros v. Biscayne Recreational Dev. Co.,* 528 So.2d 376 (Fla.App. 3 Dist.1987), *rev. denied,* 525 So.2d 880 (Fla.1988), is misplaced. There Mr. and Mrs. Sguros lived aboard a sailboat which was docked at a marina managed by the defendant. In the middle of the night the boat was boarded by intruders who started the engine, while Mr. and Mrs. Sguros were asleep below. Mr. Sguros awakened and attempted to turn off the engine below by cutting the fuel line. However, he was stricken by a heart attack and died. Suit was filed against defendant for wrongful death of Mr. Sguros, alleging negligence in failing to provide adequate security. The court held that the claim was barred because of the absence of any physical impact upon Mr. Sguros. *Sguros* is distinguishable from the instant case in several respects. First, *Sguros* involved an ordinary claim for negligent infliction of emotional distress. Unlike *Sguros,* the instant claim is a narrowly defined, non-traditional cause of action with specific prerequisites which, as discussed in the text above, provide protection against the concerns underlying the physical impact rule. We conclude that the instant case is much more similar to *Champion v. Gray, supra,* which was also a narrowly-defined, non-traditional cause of action, the definition of which provided protection against the concerns underlying the impact doctrine. The *Champion* cause of action is limited to a plaintiff with a close family relationship to the person directly impacted and injured, and is further limited by requiring that the plaintiff be directly involved (i.e., sees the accident or hears it or arrives upon the scene while the injured party is still there). 478 So.2d at 20. Like the requirements of the *Lopez* claim, those limitations protect against fraudulent claims of psychic trauma, because emotional distress is very reasonable under those circumstances.

For the foregoing reasons, we conclude that the district court appropriately held that the Florida Supreme Court would apply the significant discernible physical injuries rule[8] to a *Lopez* claim.

III. REMITTITUR WITH RESPECT TO PAIN AND SUFFERING DAMAGES

[4] Kemper argues that the verdict in the amount of $2,000,000 for pain and suffering was so excessive as to require a remittitur. Kemper argues that the insurance policy was actually cancelled on December 8, 1983, approximately one month after Kemper received notice of the murder plot, and that Bodine was aware that the policy had been cancelled by February 28, 1984.[9] Kemper also argues that much of Bodine's anxiety was necessarily caused by the murder plot itself, rather than by Kemper's alleged negligence in failing to cancel the policy.

We have carefully reviewed the record in this regard. Applying the principles established in *Glazer v. Glazer,* 278 F.Supp. 476 (E.D.La.1968), adopted as the applicable law in *Gorsalitz v. Olin Mathieson Chemical Corp.,* 429 F.2d 1033 (5th Cir. 1970), we conclude that the maximum damages for pain and suffering which the jury could have found on the evidence in this case was $1,000,000. Thus, we order a remittitur of the total damages for pain and suffering in excess of $1,000,000.[10] If, on remand, Bodine declines to accept the remittitur, then there shall be a new trial on the sole issue of total damages for pain and suffering.[11]

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8. Kemper also asserts that there was not sufficient evidence in this case of significant discernible physical injuries to satisfy the rule. We have carefully reviewed the record, and we conclude that there is sufficient evidence to satisfy the significant discernible physical injuries rule.

9. Although Bodine's attorney apparently received a copy of the cancellation letter shortly after December 8, 1983, Bodine testified that he was in hiding and did not receive notice until February 28, 1984.

10. Of course, this figure will have to be reduced by the 25% comparative negligence which the jury found on the part of Bodine.

11. The issue of the total damages for pain and suffering is sufficiently distinct and separate from the other issues in the case to warrant a new trial on that issue alone. Thus, no new trial is to take place on the other issues, including the findings of liability and comparative negligence, and including the findings of $75,000 lost earnings and $2,000 out-of-pocket expenses.

IV. CONCLUSION

The judgment of the district court is affirmed in all respects except for the award of damages for pain and suffering, and the case is remanded to the district court with instructions to order a remittitur of the damages for pain and suffering so that the total damages for pain and suffering (as thus remitted and before reduction for comparative negligence) shall be $1,000,000. If, on remand, Bodine declines to accept the remittitur, then the district court is instructed to order a new trial on the sole issue of the total damagesd for pain and suffering.

AFFIRMED in part, VACATED in part, and REMANDED with instructions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

EDMUND J. BODINE, JR. **CIVIL ACTION**

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY, et al.

NO. 85-1814-CIV-T-17

O R D E R

AND NOW, this 30th day of May, 1989, upon consideration of defendant's Motion for New Trial, Motion for Remittituer, and Motion for Judgment Notwithstanding the Verdict, and the response thereto, it is hereby Ordered that defendant's motions are DENIED.

AND IT IS SO ORDERED.

/s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 89-3481

EDMUND J. BODINE, JR.,

Plaintiff-Appellee,

versus

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING
(November 15, 1990)

BEFORE: HATCHETT and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Federal Kemper Life Assurance Company, is Denied.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
United States Circuit Judge

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

AMENDED JUDGMENT IN A CIVIL CASE

EDMUND J. BODINE, JR.

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY

CASE NUMBER: 85-1814-CIV-T-17

[X] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That Judgment is Entered for the Plaintiff, Edmund J. Bodine, Jr., in the Amount of One Million Five Hundred Fifty-seven Thousand, Seven Hundred Fifty Dollars ($1,557,750.00), and Against the Defendant, Federal Kemper Life Assurance Company, as Adjusted by the Court, on the Record, on March 9, 1989.

March 16, 1989
Date

DONALD M. CINNAMOND
Clerk

/s/ Darleen Q. Dailey
(By) Deputy Clerk

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89-3481

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 15 1990
MIGUEL J. CORTEZ
CLERK

EDMUND J. BODINE, JR.,

Plaintiff-Appellee,

versus

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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BEFORE: HATCHETT and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

BY THE COURT:

Appellant's Request for Certification of Dispositive Issues of Law to the Supreme Court of Florida, is DENIED.